BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

OCT 15 1998

In re of Applications of AMERITECH CORP., Transferor, and SBC COMMUNICATIONS, INC., Transferee for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules	)	CC Docket No. 98-141

PETITION TO DENY OF TIME WARNER TELECOM CORPORATION

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Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom, hereby files this petition to deny the above-captioned Applications.

I. INTRODUCTION AND SUMMARY.

The proposed merger between SBC and Ameritech raises very profound concerns about the potential for local exchange competition. SBC and Ameritech have both steadfastly resisted opening their local monopolies to competition, notwithstanding the promise of in-region interLATA authority. The companies' anticompetitive incentives, as well as their ability to act on these incentives, will be enhanced substantially by the proposed merger.

The Commission's analysis of the proposed merger represents a pivotal stage in the development of local exchange competition in this country. In order to ensure that this stage moves the telecommunications industry in the direction that Congress intended, the Commission should insist upon the companies' complete satisfaction of certain conditions prior to considering the merger. In this manner, the Commission can better ensure that local competition will be allowed to develop, rather than relying upon the commitments of companies with established histories of obstruction.

II. THE EFFECT OF THE MERGER ON LOCAL EXCHANGE COMPETITION IS INFORMED BY THE INDEPENDENT ACTIONS OF SBC AND AMERITECH, INCLUDING THEIR FAILURE TO COMPLY WITH THE TERMS OF THE SECTION 271 COMPETITIVE CHECKLIST.

At a minimum, before the Commission can consider the proposed merger between SBC and Ameritech, it must be satisfied that competition in local exchange markets will have the opportunity to develop. The Section 271 competitive checklist represents a minimum baseline to determine whether competition is developing (or whether it can develop) given existing conditions. SBC and Ameritech have stubbornly resisted complying with the terms of the competitive checklist and, more generally, have resisted any form of local exchange competition. Even the promise of in-region long distance authority has proven insufficient to induce these companies to open their local markets to competitive forces. Their individual attempts to prevent or forestall local exchange competition suggest that the merged entity will adopt a similar anticompetitive approach and with a greater ability to resist change.

After conducting extensive reviews of SBC's Section 271 compliance, State commissions have found wanting SBC's commitment to opening local markets to competition. The Arkansas Public Service Commission's Report to the Commission, for example, notes that "SWBT conceded that the time intervals under which SWBT will provide UNEs to a CLEC would not allow the CLEC to comply with [the Arkansas Public Service] Commission's quality of service standards for telecommunications providers."[1] With respect to 911 service, the Arkansas PSC found SWBT's performance insufficient, as competitive local exchange carrier ("CLEC") customers have experienced misrouted calls and calls lacking the requisite identifying information, such as telephone numbers and addresses.[2] The Arkansas PSC also concluded that SWBT failed to meet its directory assistance obligations under the checklist.[3]

The Texas Public Utility Commission recently stated that if it "were asked to give a recommendation to the FCC today, it regrettably would be required on the record before it to say 'not

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1 The Application of Southwestern Bell Telephone Company Seeking Verification That It Has Fully Complied With And Satisfied The Requirements Of Sec. 271(c) Of The Telecommunications Act Of 1996, Docket No. 98-048-U, *Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 U.S.C. § 271(d)(2)(B)* at 11 (Ark. PSC 1998).

2 Id. at 20.

3 Id. at 21.

yet.'"[4] It listed scores of recommendations that, if met, may bring SWBT into compliance with the checklist. Fundamentally, though, the Commission noted that "SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers."[5] SBC has, of course, not done so.

The Kansas Corporation Commission also determined that SBC's Section 271 application was deficient.[6] Likewise, a recent California Public Utilities Commission Staff Report revealed substantial problems with SBC's implementation of the Section 271 checklist.[7]

Ameritech, too, has failed to comply with the terms of the competitive checklist and has otherwise engaged in conduct designed to achieve anticompetitive and discriminatory

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4 Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market, PUC Project No. 16251, *Commission Recommendation* at 2 (Tex. PUC May 21, 1998).

5 Id.

6 See "Kansas Declines to Back SWBT's InterLATA Plans," Telecommunications Reports, Aug. 31, 1998 at 11 (describing the Kansas Corporation Commission's decision and the supporting KCC Staff memo that cites evidence that "customers' directory and '911' listings have been dropped or changed incorrectly when they switched their local exchange service to an SWBT competitor.").

7 In Re Pacific Bell [U 1001 C] and Pacific Bell Communications Notice of Intent to File Section 271 Application for InterLATA Authority in California, *California Public Utilities Commission Telecommunications Division Final Staff Report* (Cal. PUC Oct. 5, 1998).

objectives. Through its own Section 271 examination of Ameritech, the Commission is aware of Ameritech's failure to satisfy the terms of the competitive checklist. There are no recent Section 271 decisions from State PUCs in Ameritech's region to supplement that record. Ameritech has apparently abandoned its attempt to enter the interLATA market because the threat of local competition (the consequence of true checklist compliance) is too great.

In addition to the problems identified in Section 271 proceedings, Ameritech has repeatedly demonstrated its intent to discriminate against its rivals and to cross-subsidize its subsidiaries providing competitive services. For example, TWTC has filed complaints against Ameritech in Indiana, Ohio, and Wisconsin due to Ameritech's failure to provide adequate long term number portability.[8] End users who change service providers from Ameritech to Time Warner Telecom have suffered outages and delays in receiving service, impairing the quality and reliability of the service they receive, and resulting in customer inconvenience and safety concerns. All these problems

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8 See Time Warner Telecom of Ohio, L.P. v. Ameritech Ohio, Case No. 98-1438-TP-CSS, *Complaint* (Ohio PUC filed Oct. 13, 1998); The Complaint of Time Warner Communications of Indiana, L.P. Against Indiana Bell Telephone Company Incorporated D/B/A Ameritech Indiana for a Violation of TA-96 Relating to Ordering and Implementation of Number Portability and for Violation of Other Statutes, Cause No. 41306, *Complaint* (Ind. URC filed Oct. 13, 1998); Time Warner Telecom v. Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin, Docket No. ___, *Complaint* (Wis. PSC filed Oct. 13, 1998). Attached as Exhibits A, B, and C respectively.

are due to Ameritech's method and procedures for processing orders for porting numbers and effectuating cutovers.

TWTC's experience in Columbus, Ohio illustrates the problem. There, the Defense Megacenter ordered 20,000 lines from TWTC. Cutover was scheduled for May 1, 1998, but Ameritech made translation changes on April 24, 1998, seven days earlier than scheduled. As a result, the Defense Megacenter was unable to receive incoming calls for 23 minutes, a time interval that would have been much longer if TWTC personnel had not responded quickly. On the scheduled cutover date of May 1, 1998, Ameritech made the cutover on a piecemeal basis, taking 10 hours to complete the cutover. Once the cutover was completed, it still took TWTC a week to get the numbers working correctly.

In addition to providing inadequate LNP, Ameritech has failed to construct and interconnect the facilities necessary to ensure adequate and reliable telephone service to the customers of both TWTC and Ameritech. Ameritech has also refused to provide TWTC with interconnection to its network that is at least equal in quality to that it provides to itself. TWTC recently filed a complaint seeking resolution of this problem with the Indiana URC against Ameritech Indiana.[9] The IURC has not reached a decision.

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9 <u>The Complaint of Time Warner Communications of Indiana, L.P. Against Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana, For Violation of the Terms of the Interconnection Agreement Relating to Network Construction, For Violation of TA-96, and for Violation of Other Relevant Statutes</u>, Cause No. 41252, *Verified Complaint of Time Warner Communications of Indiana, L.P.* (Ind. URC filed Aug. 20, 1998), attached as Exhibit D.

Ameritech has also refused, in clear violation of its interconnection agreements with TWTC, to pay TWTC reciprocal compensation for local calls to TWTC ISP customers. Three of the five State PUCs before whom this issue was raised have already decided these cases in favor of the CLECs,[10] and the issue remains pending in the two other Ameritech States.[11] Moreover, until recently, Ameritech refused to pay prevailing parties in these cases even after the State PUCs ordered them to do so and even after their requests for judicial stays had been denied.

In yet another recognition that Ameritech's mode of operation is to abuse its market power, the regulatory commissions in both Michigan and Illinois ordered Ameritech to cease and desist from its misleading PIC freeze practices.[12]

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10 Teleport Communications Group v. Illinois Bell Telephone Co. d/b/a Ameritech Illinois, Case Nos. 97-0404, 97-0519, 97-0525, *Order* (Ill. CC, Mar. 11, 1998); Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on behalf of Ameritech Michigan, Case Nos. U-11178, U-11502, U-11553 and U-11554, *Opinion and Order* (Mich. PSC, Jan. 28, 1998); Contractual Dispute About the Terms of an Interconnection Agreement Between Ameritech Wisconsin and TCG Milwaukee, Inc., Docket Nos. 5837-TD-100, 6720-TD-100, *Order* (Wis. PSC, May 13, 1998); Complaint by Time Warner Communications About Alleged Non-Compliance by Ameritech Wisconsin, Docket Nos. 5912-TD-100, 6720-TD-101, *Order* (Wis. PSC, June 17, 1998).

11 Complaint of Time Warner Communications of Indiana, L.P. Against Indiana Bell Telephone Company d/b/a Ameritech Indiana for Violation of the Terms of the Interconnection Agreement, Cause No. 41097 (Ind. URC); Complaint of ICG Telecom Group v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation, Case No. 97-1557-TP-CSS (Ohio PUC).

12 See MCI Telecommunications Corp. et al. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket Nos. 96-0075, 96-0084, *Order*, 1996 Ill. PUC LEXIS 205 (Ill. CC, Apr. 3, 1996); Sprint Communications Co. v. Ameritech Michigan,

Under the guise of slamming protection, this scheme made it very difficult for customers to take the intraLATA toll and local service of Ameritech competitors.

Moreover, Ameritech has unfairly used its control over telephone poles to discriminate in favor of its cable television subsidiary. The Public Utilities Commission of Ohio ("PUCO") held that Ameritech Ohio unreasonably afforded its wholly-owned cable television subsidiary, Ameritech New Media, unjustly discriminatory and preferential pole attachment treatment in relation to non-affiliated cable operators.[13] In short, Ameritech used its control over local exchange facilities to disadvantage the competitors of its subsidiaries.

Furthermore, in both Michigan and Ohio, the Public Service Commissions concluded that Ameritech had unlawfully used its local exchange operations to subsidize directly the video service offerings of Ameritech New Media by distributing cash vouchers to Ameritech New Media's new and potential cable subscribers. The voucher benefits were not limited to video services. Rather, customers subscribing to Ameritech New Media's cable service

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Case No. U-11038, *Opinion and Order*, 171 P.U.R. 4th 429 (Mich. PSC, Aug. 1, 1996).

13 See Complaint of the Ohio Cable Telecommunications Ass'n, et al. v. Ameritech Ohio, Case No. 96-1027-TP-CSS, *Opinion and Order*, slip op. at 16 (rel. Apr. 17, 1997)(Ohio PUC noting that "[c]learly the evidence shows that New Media has been treated preferentially over the complainants. As a result, we find that New Media has enjoyed an advantage by being able to attach its facilities below Ameritech's wires, at less cost than the complainants' costs to install their facilities, which also created a future benefit for New Media in lower costs to service its facilities").

could redeem the AmeriChecks vouchers for a multitude of non-video services offered by Ameritech, including local telephone service. The PUCO ordered discontinuance of the AmeriChecks program in Ohio, concluding that the program violated Ohio law by "allow[ing] New Media subscribers to pay less for their local telephone service than Ameritech Ohio customers that do not subscribe to New Media, even though the telephone service received by both customers is identical."[14] The Michigan Public Service Commission ("MPSC") also found that the AmeriChecks marketing program violated state laws and ordered Ameritech Michigan to cease and desist from further violations.[15]

These instances comprise merely an illustrative fraction of the evidence that SBC and Ameritech have systematically resisted competitive entry by abusing their market power.[16] As they seek to enter markets in SBC and Ameritech regions, other CLECs have encountered many other difficulties created by SBC and Ameritech. The examples described above, though, demonstrate that SBC and Ameritech clearly retain anticompetitive incentives and opportunities to act on those incentives.

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14 Complaint of the Ohio Cable Telecommunications Association v. Ameritech Ohio, Case No. 97-654-TP-CSS, *Opinion and Order*, slip op. at 4 (rel. July 17, 1997).

15 The Michigan Cable Telecommunications Association against Ameritech Michigan, Case No. U-11412, *Opinion and Order*, 1997 Mich. PSC LEXIS 359 (rel. Dec. 19, 1997).

16 Of course it is likely that SBC's and Ameritech's markets would be more open to competition if these firms were to enter each other's markets. In fact, because of their vast resources, the BOCs are uniquely situated to pressure ILECs to cooperate with new entrants. The merger, of course, eliminates this possibility.

III. THE COMMISSION SHOULD NOT CONSIDER THE MERGER UNTIL SBC AND AMERITECH HAVE DEMONSTRATED COMPLIANCE WITH CERTAIN MERGER PRECONDITIONS.

Given the independent histories of SBC and Ameritech in opposing the development of local competition and the fact that the merger will enhance their incentives and abilities to forestall competition, the Commission should refuse to consider the merger until SBC and Ameritech have demonstrated compliance with certain merger preconditions. Conditions subsequent have proven largely ineffective in the context of the Bell Atlantic-NYNEX merger.[17] Moreover, SBC has already demonstrated its willingness to renege on commitments.[18] As the RBOCs consolidate, more and more local monopolies are brought under common ownership. This could have serious effects on TWTC as a

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17 See, e.g., MCI Telecommunications Corp. and MCImetro Access Transmissions Services, Inc. v. Bell Atlantic Corp., File No. E-98-12, *Complaint* (FCC, filed Dec. 19, 1997)(charging Bell Atlantic with failing to abide by merger conditions and offering as an example Bell Atlantic's "refusal to offer interconnection and network elements at forward-looking pricing" based on the TELRIC methodology); AT&T Corp. v. Bell Atlantic Corp., File No. E-98-05, *Complaint* (FCC, filed Nov. 5, 1997)(charging Bell Atlantic with violating its merger agreement by failing to offer new entrants interconnection rates based on forward-looking costs); MCI Telecommunications Corp. and MCImetro Access Transmission Services v. Bell Atlantic Corp., File No. E-98-32, *Complaint* (FCC, filed Mar. 17, 1998)(charging that Bell Atlantic is violating terms of the merger agreement by failing to satisfy conditions for performance standards, monitoring reports, and enforcement mechanisms).

18 See Dan Gillmor, "SBC Deserves the Chutzpah Nomination," San Jose Mercury News at D1 (Jan. 18, 1998)(having all but assured San Jose's community that SBC would maintain PacBell's cable service there, SBC shut down the San Jose cable operation).

new entrant into local telephony and other services.[19] This is so because the huge aggregation of local service areas gives an RBOC an increased ability and incentive to discriminate against rivals by discriminating in interconnection or refusing to deal altogether for some services.

In addition, the staggering size of the merged entity suggests that post-merger regulatory control will be difficult, if not impossible. Ameritech proclaims itself to be one of the 100 largest companies in the world,[20] and SBC lauds itself as "one of the largest telecommunications companies in the world."[21] After the merger, SBC and Ameritech anticipate that the merged entity will have annual revenues of $41 billion.[22] The SBC/Ameritech merger will result in a giant that will account for nearly 1/2 of the $80 billion revenues generated by the long distance industry annually. Moreover, the SBC/Ameritech merger will represent nearly 21% of the $200 billion in revenues generated by the entire U.S. telecommunications industry. The merged company also will control a lion's share of the local access lines used to provide business and residential customers with local phone service in the country -- the bottleneck facilities to which competitors need access in order to provide

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19 The RBOCs will retain considerable monopoly power even when the Section 271 standards are met for entering long distance markets.

20 _See_ <www.ameritech.com>.

21 _See_ <www.sbc.com>.

22 _See_ SEC Form S7 at p. 62 (filed June 5, 1998).

competitive local service. After the merger, SBC/Ameritech will own and control 1/2 of all the local access lines used for businesses and 1/3 of all the local access lines used for residential services in the United States.[23] SBC and Ameritech claim that the proposed merger is about more competition, not less: the reality is that the merger will vest control of approximately 40% of the facilities necessary for competition in the hands of one mega-monopoly provider. The resources available to a firm this size dwarf those of the regulators, making it doubtful indeed that regulation will constrain the merged entity.

Hence, the Commission should design conditions to permit the development of local competition and require that they be fully satisfied prior to any consideration of the SBC/Ameritech merger. These preconditions are appropriately fashioned in response to independent SBC and Ameritech shortcomings in opening their local monopolies to competition.

The Commission should require both SBC and Ameritech to fully satisfy the following preconditions prior to considering the proposed merger:

INTERCONNECTION

- SBC/Ameritech must implement measures to expedite construction and installation activities both at the tandem and end office locations and engage in cooperative planning of trunking facilities with a view toward providing parity with CLECs.

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23 See John Simons, "SBC's Whitacre Defends His Plan to Buy Ameritech," The Wall Street Journal at B10 (May 20, 1998).

- SBC/Ameritech must agree to interconnect at any feasible point in its network, including second tandem locations to support network redundancy.

- SBC/Ameritech must amend physical collocation tariffs to provide for more flexible arrangements, including shared collocation space, cageless collocation, and smaller minimum space requirements. Rates for physical and virtual collocation must be based on forward-looking costs.

- SBC/Ameritech should only be permitted to deny collocation due to lack of space if certified by state commissions. CLECs must have the opportunity to tour central offices and comment on requests to deny space. SBC/Ameritech must not be permitted to reserve or hold collocation space for any affiliate.

- When a CLEC converts a virtual collocation to a physical collocation, the CLEC must be allowed to obtain title to the equipment currently utilized in the virtual collocation arrangement.

- SBC/Ameritech must be required to allow CLECs to purchase equipment for virtual collocation under their own vendor arrangements, and sell that equipment to SBC/Ameritech in order to reduce CLEC costs.

UNEs

- SBC/Ameritech must agree to a definition of unbundled loops that includes provisioning in central offices without requiring collocation, i.e., extended loops to existing CLEC collocation sites.

RECIPROCAL COMPENSATION

- SBC/Ameritech must pay all invoices issued for the termination of ISP traffic, consistent with state commission orders. ISP traffic should continue to be classified as local traffic and compensated at the local interconnection rates contained in interconnection agreements. The obligation to pay reciprocal compensation should not be conditioned in any way, nor should the CLEC be required to file for arbitration or to file a complaint to receive compensation.

- SBC/Ameritech must provide traffic reports in accordance with the terms of the interconnection agreements to avoid billing disputes at the end of the relevant traffic balancing period.

OPERATING SUPPORT SYSTEMS

- SBC/Ameritech must receive certification from state commissions that OSS obligations have been fully met.

PERFORMANCE MEASUREMENTS

- SBC/Ameritech must agree to and fully implement the Local Competition Users' Group (LCUG) Service Quality Measurements, Version 7.0, and agree to liquidated damages for non-performance.

- In addition to meeting average performance measures, the merged entity should be held accountable for disruption of major customer installations.

- SBC and Ameritech should perform and report on Long Term Number Portability ("LNP") performance using established national standards and customer requirements regarding LNP delivery dates.

NUMBER PORTABILITY

- SBC and Ameritech should be prohibited from using a 7 digit trigger for LNP. Ten digits is the national standard. SBC and Ameritech should be prohibited from imposing on a CLEC a 120 day penalty for not cutting over to interim number portability.

ACCOUNT MANAGEMENT STRUCTURE

- SBC/Ameritech must provide assurance through written documentation that an adequately-staffed account management team structure for CLECs will remain in place with local contacts and escalation procedures after the merger. The account management team structure must act as an advocate for the wholesale CLEC customer, with salary incentives tied to the service performance.

- SBC/Ameritech must present a description of its wholesale organization including job duties, work flow analysis, and escalation procedures. Moreover, the State PUCs must verify to the Commission that SBC/Ameritech has adequately documented the operational relationships and interactions between their personnel and CLEC account managers which will be in place after the merger.

ANTI-COMPETITIVE ISSUES

- The State PUCs must verify to the Commission that SBC/Ameritech has documented company policies and procedures related to the access to and dissemination between affiliates and LEC operations of competitive carrier CPNI and other proprietary information. Specifically, the State PUCs must verify to the Commission that SBC/Ameritech has provided proof that it is not using competitors' proprietary information for its own use.

- The State PUCs must verify that SBC does not use CPNI in marketing campaigns for win-backs.[24]

- The State PUCs must verify to the Commission that all transactions between SBC/Ameritech affiliates:

  - Are reduced to writing and available for public inspection using Ameritech's website;
  - Include a written description of the asset or service transferred along with all terms and conditions; and
  - Include all cost support to justify rates used to value the service or asset.

- The State PUCs must verify to the Commission that SBC/Ameritech has developed a process to provide the States and CLECs with any additional information deemed necessary to a determination of whether services and asset transfers were non-discriminatory.

- The State PUCs must verify to the Commission that they will ensure that criteria, procedures, and processes are developed to demonstrate that SBC/Ameritech affiliates are treated on an arms-length basis, and that non-affiliated carriers are treated under the same terms and conditions as SBC/Ameritech for the purchase of tariffed services.

- The State PUCs must assure the Commission that expedited processes are in place by which CLECs may seek review of or challenge any transaction, including the provision of

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24 In the California Section 271 proceeding, there was evidence that Pacific Bell was soliciting customers just after a customer decided to switch carriers. See Staff Report, supra n.7.

services and asset transfers, between SBC/Ameritech and its affiliates.

- The State PUCs must verify to the Commission that they will issue an immediate stay of a challenged ILEC affiliate transaction or process, pending State PUC review of that challenged transaction or process, until the State PUC authorizes continuation of the transaction or process.

- The State PUCs must verify to the Commission that SBC/Ameritech has demonstrated that use of OSS by ILEC affiliates is identical to use of those systems by unaffiliated CLECs.

IV. CONCLUSION

For the foregoing reasons TWTC respectfully urges the Commission to recognize the potentially devastating consequences for local competition presented by the proposed merger and to require that TWTC's list of preconditions be satisfied prior to the Commission's consideration of the merger.

Respectfully submitted,

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